No. 84-858

Office-Supreme Court, U.S.
FILED
NOV 29 1984
ALEXANDER L. STEVAS,
CLERK

In the Supreme Court

of the United States

OCTOBER TERM, 1984

DAVID TARTER, et al.,

Respondents

v.

WILLIAM RAYBUCK, et al.,

Petitioners

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone (216) 929-4291
Counsel of Record for Petitioners

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone (216) 929-4291
Counsel for Petitioners

59 pp

QUESTION PRESENTED

Whether this action initiated by the Respondents (Plaintiffs in the courts below) pursuant to 42 U.S.C. §1983 was frivolous and without foundation so as to justify an award of reasonable attorney fees and costs to the prevailing Petitioners (Defendants in the courts below) pursuant to the provisions of 42 U.S.C. §1988.

LIST OF ALL PARTIES

Petitioners:	William Raybuck David E. Rump Bill Spargur Marianne Rovnyak Dr. Harold E. Wilson Cuyahoga Falls City School District Board of Education
Respondents:	David Tarter Dennis Tarter Judy Tarter

TABLE OF CONTENTS

Question Presented ..... *i*

List of All Parties ..... *ii*

Table of Authorities ..... *iv*

Opinions and Judgments Below 1

Jurisdiction 2

Constitutional and Statutory Provisions Involved 3

Statement of the Case 4

Summary of Argument 6

Argument 7

Conclusion 14

Certificate of Service 15

Appendices:

A. Decision of the United States Court of Appeals, Sixth Circuit, filed August 31, 1984 ..... A-16

B. Memorandum Opinion of the United States District Court for the Northern District of Ohio, Eastern Division, filed February 7, 1983 ..... B-37

C. Judgment Entry of the United States District Court for the Northern District of Ohio, Eastern Division, filed February 7, 1983 ..... C-49

D. Order of the United States District Court for the Northern District of Ohio, Eastern Division, filed June 10, 1983 ..... D-50

E. 42 U.S.C. §1988 ..... E-54

TABLE OF AUTHORITIES

Cases

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 6,8

Harbulak v. County of Suffolk, 654 F. 2d 194 (2nd Cir. 1981) 12

Hensley v. Eckerhart, 461 U.S. 424 (1983) 9

Hughes v. Rowe, 449 U.S. 5 (1980) 8,11

Monell v. Department of Social Services of New York, 436 U.S. 658 (1978) 12

Reichenberger v. Pritchard, 660 F. 2d 280 (7th Cir. 1981) 9

Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983) 7,10,11,13

Tarter v. Raybuck, ____ F. 2d ____ (6th Cir. 1984) 7,10

Ziegler v. Jackson, 716 F. 2d 847 (11th Cir. 1983) 9

Constitutional Provisions

Fourth Amendment, U.S. Constitution 3,4

Fourteenth Amendment, U.S. Constitution 3,4

Statutes

42 U.S.C. §1983 3,4,7,8,9,13

42 U.S.C. §1988 3,5,6,7,9

Ohio Revised Code §3313.66 9,10

OPINIONS AND JUDGMENTS BELOW

The decision of the Court of Appeals for the Sixth Circuit (App. A, infra, p. A-16) has not yet been reported. The Memorandum Opinion of the District Court (App. B, infra, p. B-37) is reported at 556 F. Supp. 625. The Judgment Entry of the District Court granting a directed verdict to Petitioners Rovnyak, Wilson, and the Cuyahoga Falls City School District Board of Education (App. C, infra, p. C-49) has not been reported. The Order of the District Court awarding reasonable attorney fees to the Petitioners (App. D, infra, p. D-50) is not reported.

JURISDICTION

The decision of the United States Court of Appeals for the Sixth Circuit (App. A, infra, p. A-16) was filed on August 31, 1984. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the United States Constitution provides in relevant part:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, ***

2. The Fourteenth Amendment to the United States Constitution provides in relevant part:

> *** No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

3. The Civil Rights Act of 1871, 42 U.S.C. §1983, provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

4. The Civil Rights Attorney Fees Act of 1976, 42 U.S.C. §1988, provides in relevant part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, [or] 1983 *** the court, in its discretion, may allow the prevailing party, other than the United States, reasonable attorneys fees as part of the costs.

STATEMENT OF THE CASE

UNITED STATES DISTRICT COURT PROCEEDING:

This case was initiated by Respondents, David Tarter, Dennis Tarter, and Judy Tarter, with the filing of their Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, on September 18, 1981. Jurisdiction in this action was allegedly invoked pursuant to the provisions of the Civil Rights Act of 1871, 42 U.S.C. §1983 and 28 U.S.C. §1343(e) and named as Defendants in the Complaint were Petitioners, five (5) administrators of the Cuyahoga Falls City School District (William Raybuck, David E. Rump, Bill Spargur, Marianne Rovnyak, and Dr. Harold E. Wilson) and the Cuyahoga Falls City School District Board of Education.

The Complaint alleged, in the First Cause of Action, that Respondent David Tarter's rights under the Fourth and Fourteenth Amendments to the United States Constitution along with his rights to privacy and equal protection of the laws had been violated when he was allegedly subjected to a search by Petitioners Raybuck and Spargur. The First Cause of Action also alleged that Respondent David Tarter was denied his rights under the Fourth and Fourteenth Amendments to the United States Constitution when he was suspended and expelled from the second semester of the 1980-81 school year by Petitioners Wilson and Board of Education for the possession and/or use of drugs. Finally, in the Second Cause of Action, the Respondents Dennis, Judy, and David Tarter alleged that they were denied constitutionally protected rights when they were falsely imprisoned by Petitioners Raybuck, Spargur, Rovnyak and Rump.

On October 21, 1981, the Petitioners filed their Answer to the Complaint denying all material allegations. Additionally, Petitioners filed a Counterclaim which asserted that the Respondents' action was frivolous and without merit and requested the Court to award the Petitioners their reasonable attorney fees and costs incurred in the defense of the same.

On January 3, 1983, this matter was heard in a trial to the court before the Honorable David D. Dowd, Jr., and at the

conclusion of the presentation of the Respondents' case, a motion for a directed verdict was made on behalf of all the Petitioners as to the three (3) alleged causes of action contained in the Complaint. The Court granted the motion with respect to three (3) of the six (6) Petitioners, Marianne Rovnyak, Dr. Harold E. Wilson, and the Cuyahoga Falls City School District Board of Education (App. C, infra p. C-49). The trial continued with respect to the three (3) remaining Petitioners, William Raybuck, David E. Rump, and Bill Spargur, and the First Cause of Action as it related to the alleged search of Respondent David Tarter by Petitioners Raybuck and Spargur.

Subsequently, on February 7, 1983, the Court issued its Memorandum Opinion (App. B, infra, p. B-37) which awarded judgment to the Petitioners with respect to the Respondents' claims. In addition, the Court further concluded that the respondents' action was "frivolous, unreasonable, or without foundation," and that the Petitioners were entitled to recover their reasonable attorney fees under the provisions of 42 U.S.C. §1988 (App. B, infra, p. B-46-47). See also, *Tarter v. Raybuck*, 556 F. Supp. 625, 631 (N.D. Ohio 1983).

Thereafter, the Petitioners filed an Application and Amended Application for Reasonable Attorney Fees, and hearings were conducted by Judge Dowd on February 17 and 25, 1983. On June 10, 1983, the Court filed its Order which granted the Petitioners reasonable attorney fees in the total amount of $9,668.00 and reasonable costs in the amount of $1,179.90, (App. D, infra, p. D-50).

UNITED STATES COURT OF APPEALS PROCEEDING:

A Notice of Appeal from the decision of the District Court was filed in the United States Court of Appeals for the Sixth Circuit on behalf of the Respondents on March 4, 1983. The Court of Appeals issued its decision on August 31, 1984, which affirmed the District Court's judgment in favor of the Petitioners with respect to all of the claims of the Respondents. However, the Court of Appeals reversed the District Court's judgment in favor of the Petitioners on their counterclaim for reasonable attorney fees under 42 U.S.C. §1988. It is the latter portion of the Court of Appeals decision which the Petitioners now seek to have reviewed by the Supreme Court of the United States.

SUMMARY OF ARGUMENT

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), this Court held that a district court may, in its discretion, award attorney fees to a prevailing defendant in a civil rights case upon a finding that the plaintiff's action was "frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. The District Court in the instant matter, after a full evidentiary hearing, correctly applied this standard in determining that the prevailing Petitioners were entitled to an award of reasonable attorney fees in accordance with 42 U.S.C. §1988, and its judgment should be reinstated by this Court.

ARGUMENT

This case presents critical questions of federal law concerning the availability of reasonable attorney fees to prevailing defendants in cases brought pursuant to 42 U.S.C. §1983, as well as the authority of a federal district court to exercise its discretion in awarding such fees and the extent to which that exercise of discretion may be limited on review. As this Court is certainly aware, the instances in which financially troubled local governmental units, such as boards of education, have been forced to expend public funds in the defense of frivolous and unreasonable litigation are becoming increasingly common. These governmental units and their employees must be afforded some protection and an effective deterrent against such frivolous litigation which not only places a burden upon the dwindling resources available to the governmental agency, but also upon the already overburdened federal judicial system.

In its decision in the case at bar, the District Court held as follows:

> Upon review of the evidence in this case in light of these standards, the Court finds that this action was "frivolous, unreasonable, or without foundation . . ." Therefore, the Court concludes that the defendants are entitled to recover their reasonable attorney's fees under the provisions of 42 U.S.C. §1988 . . .
>
> 556 F. Supp. at 631

However, the Court of Appeals concluded that the District Court abused its discretion in rendering judgment in favor of the Petitioners on their counterclaim for reasonable attorney fees and reversed the same. ____ F. 2d at ____ (App. A, infra. p. A-36).

As set forth above, 42 U.S.C. §1988 provides the trial court with the discretionary authority to allow the prevailing party an award of reasonable attorney fees in any action brought pursuant to 42 U.S.C. §1983. Admittedly, attorney fees have generally been awarded in civil cases where the

"prevailing party" has been the plaintiff who initiated the action to vindicate fundamental constitutional rights. However, the plain language of the statute clearly does not limit such an award only to prevailing plaintiffs, but rather to any prevailing *party*, although a different standard has been established for an award of reasonable attorney fees to a prevailing defendant.

In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), this Court established the standard for awarding attorney fees to prevailing defendants in civil rights cases. This Court stated that

> a district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith.
>
> 434 U.S. at 421

In *Hughes v. Rowe*, 449 U.S. 5 (1980), this Court applied the *Christiansburg* standard to actions brought pursuant to 42 U.S.C. §1983. In its *Per Curiam* opinion, the Court stated:

> In *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412, 98 S. Ct. 694, 54 L. Ed. 648 (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff only if the District Court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, at 421, 98 S. Ct. at 700. Although arguably a different standard might be applied in a civil rights action under 42 U.S.C. §1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.
>
> 449 U.S. at 14

The decision to award attorney fees under 42 U.S.C. §1988 and the amount of the award are clearly committed to the discretion of the trial court. As this Court recently stated in *Hensley v. Eckerhart*, 461 U.S. 424 (1983),

> [w]e reemphasize that the district court has discretion in determining the amount of a fee award. This is appropriate in view of the district court's superior understanding of the litigation and the desirability of avoiding frequent appellate review of what essentially are factual matters . . .
>
> 461 U.S. at ——

In addition, an appellate court cannot set aside an award of attorney fees unless it finds that the trial court abused its discretion. *Zeigler v. Jackson*, 716 F. 2d 847, 850 (11th Cir. 1983); *Reichenberger v. Pritchard*, 660 F. 2d 280, 288 (7th Cir. 1981).

In the instant matter, the District Court applied the *Christiansburg* standard and considered the three (3) causes of action set forth in the Respondents' Complaint as they applied to each defendant in the context of this standard. First, with respect to the Respondents' allegation that the actions of Petitioners Wilson and Board of Education in the expulsion of David Tarter from school were constitutionally impermissible and their prayer that he be readmitted, the District Court stated:

> Pursuant to R.C. 3313.66 et seq., the plaintiff parents appealed the expulsion to the Board of Education of Cuyahoga Falls. Considerable testimony was taken with respect to that appeal. See Exhibit H. *A study of the record of the expulsion hearing before the Board of Education fails to reveal any factual basis to warrant the filing of a complaint alleging conduct on the part of the defendants actionable under 42 U.S.C. §1983.*
>
> The plaintiff's complaint prayed for relief including an order from this Court compelling the defendant school board and defendant school administrators to permit the plaintiff David Tarter to reenter Cuyahoga Falls High School. The com-

plaint was filed in September of 1981 after David Tarter, as a matter of law, was eligible to return to school because his expulsion was for only the semester, consistent with the provisions of Ohio Revised Code §3313.66. The fact that the expulsion was for only the period of a semester was clearly indicated by a letter mailed to the plaintiffs following the expulsion. See Exhibit 5. Nonetheless, the student David Tarter made no attempt to reenter Cuyahoga Falls High School. His parents failed to make any inquiry on behalf of David Tarter calculated to bring about his reentry into Cuyahoga Falls High School. The defendants took no action which in any way could have been construed as an attempt to prohibit David Tarter from returning to Cuyahoga Falls High School.

(Emphasis Added)

556 F. Supp. at 631-632

(App. B, p. B-47)

Thus, the District Court granted a directed verdict to Petitioners Wilson and the Board of Education on this portion of the First Cause of Action, and the Court of Appeals agreed with the District Court that

> the complaint, not filed until September 1981, was meritless to the extent that it sought an order to compel defendants to permit David Tarter to reenter Cuyahoga Falls High School. Nothing was ever alleged or shown which might have conceivably been characterized as action by defendants to deny David Tarter reentry.

____ F. 2d at ____

(App. A, p. A-33)

Second, with respect to the allegation that David Tarter and his parents were wrongfully detained in the high school clinic, the District Court found this contention to be "patently without merit," 556 F. Supp. at 632 (App. B, p. B-47), and the Court of Appeals agreed. ____ F. 2d at ____ (App. A, p. A-33).

Finally, with respect to the question of the search of

David Tarter, the District Court concluded that

> [i]t is without dispute that the search of David Tarter on the morning of March 3, 1981, ceased immediately upon his revocation of the consent that he had earlier given to a search of his person. David Tarter has never maintained to the contrary . . .
>
> 556 F. Supp. at 632
> (App. B, p. B-47)

It is on this point to which the Court of Appeals took exception. ____ F. 2d at ____ (App. A, p. A-34). However, as stated by Mr. Justice Rehnquist in *Hughes v. Rowe, supra,* (dissenting opinion):

> [t]he decision whether to award attorney's fees under 42 U.S.C. §1988 is committed to the discretion of the district courts, who are intimately familiar with the course of the litigation . . .
>
> 449 U.S. at 183

The District Court, in the case at bar, conducted a trial, heard all of the evidence and carefully analyzed the pleadings including the Petitioners counterclaim which was filed at the inception of this litigation, and it concluded that the Respondents' action was "frivolous, unreasonable, or without foundation." It must be emphasized that the Respondents asserted several separate causes of action against the six (6) Petitioners. As to the search issue, only Petitioners Raybuck and Spargur were allegedly involved in any actual search and Petitioner Rump was implicated by virtue of his position as high school principal. In the cause of action concerning the alleged wrongful expulsion, only Petitioners Wilson and Board of Education were named and charged. Finally, the Petitioner Rovnyak was required to defend the cause of action relating to the alleged false imprisonment. The District Court concluded, and the Court of Appeals agreed, that there was no evidence whatsoever stating a claim against three (3) of the Petitioners, Wilson, Rovnyak, and the Board of Education, and, accordingly, the Trial Court sustained a motion for a directed verdict made on

their behalf at the conclusion of the Respondents' case. 556 F. Supp. at 626 (App. B, p. B-37). Of particular significance is the District Court's finding that the Respondents had no basis for a claim against the Petitioners Board of Education, Wilson, and Rovnyak. These three (3) separate Petitioners would not have been required to defend in this matter but for the allegations contained in Respondents' Complaint which both the Trial Court and Court of Appeals found to be "frivolous, unreasonable, or without foundation" and "patently without merit."

Regardless of the claims the Respondents may have had against the individual administrators, there was no basis whatsoever for a suit against the Board of Education, which is a body corporate and politic under state law. See, Chapter 3313 Ohio Revised Code. In *Monell v. Department of Social Services of the City of New York*, 436 U.S. 658 (1978), this Court held that local governmental bodies may be sued directly under 42 U.S.C. §1983; however a local government cannot be held liable on a *respondeat superior* theory. This Court concluded that

> a local government may not be sued under §1983 for an injury inflicted solely by its employees or agents. Instead it is when execution of a government's policy or custom, whether made by lawmakers or by those whose edicts or acts may fairly be said to represent official policy, inflicts the injury that the government as an entity is responsible under §1983 . . .
>
> 436 U.S. at 694

There was absolutely no claim nor any evidence that the administrators' alleged unconstitutional search of the Respondent David Tarter was part of an official policy or custom of the Board of Education of the Cuyahoga Falls City School District. See also, *Harbulak v. County of Suffolk*, 654 F. 2d 194 (2nd Cir. 1981).

The Court of Appeals focused solely on the issue of the search of David Tarter when it concluded that the District Court abused its discretion in awarding attorney fees under

42 U.S.C. §1988. The Petitioners disagree with the rationale of the Court of Appeals. The Trial Court set forth its analysis of the issues in this matter and on the matter of the search it found favorably for Petitioners Raybuck and Spargur. It had the advantage of being intimately familiar with the course of this litigation. For this reason, the Court of Appeals was in error when it found the Trial Court's decision to be arbitrary, unreasonable and capricious.

Painfully absent from the decision of the Court of Appeals is its rationale for reversing an award of attorney fees to the Petitioners Board of Education, Rovnyak and Wilson who had no involvement in the search issue. Their only reason for defending in this suit were the allegations which both courts found to be frivolous, and without merit. Assuming, *arguendo,* that the Court of Appeals was correct as to the Petitioners, Raybuck and Spargur, involved in the search, there is no justification for the reversal of the award of attorney fees to the other Petitioners, to wit; Rump, Wilson, Rovnyak and the Board of Education, who prevailed in *all* respects on claims found to be "patently without merit."

Without explanation, and with an unusually narrow singular approach, the Court of Appeals has tarred all Petitioners with the same brush. Clearly, each petitioner's claim for attorney's fees must be considered individually and when this is done it is abundantly clear that some, if not all, petitioners are entitled to this high court's protection from frivolous, nonsensical litigation.

CONCLUSION

The Petitioners, individually and collectively, strongly urge this Court to grant the Petition for a Writ of Certiorari.

Respectfully submitted,

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel of Record for Petitioner

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Petition for a Writ of Certiorari was served upon George B. Vasko, Attorney for Respondents, 1706 Ohio Edison Building, Akron, Ohio 44308, by regular U.S. mail service, postage prepaid, this _____ day of November, 1984.

DENNIS M. WHALEN
Counsel for Petitioners

RECOMMENDED FOR FULL TEXT PUBLICATION
See, Sixth Circuit Rule 24

No. 83-3174

UNITED STATES COURT OF APPEALS

FOR THE SIXTH CIRCUIT

DAVID TARTER, et al.,
Plaintiffs-Appellants,

v.

WILLIAM RAYBUCK, et al.,
Defendants-Appellees.

ON APPEAL from the United States District Court for the Northern District of Ohio, Eastern Division.

Decided and Filed August 31, 1984

Before: MERRITT and KRUPANSKY, Circuit Judges; and PHILLIPS, Senior Circuit Judge.

PHILLIPS, Senior Circuit Judge. This action was brought under 42 U.S.C. § 1983 by David Tarter, and his parents, Judy and Dennis Tarter. The defendants were five administrators of the Cuyahoga Falls City School District, William Raybuck, David E. Rump, William Spargur, Marianne Rovnyak, and Dr. Harold E. Wilson, and the Cuyahoga Falls Board of Education. The complaint alleged that David, while a student at Cuyahoga Falls High School, had been subjected to an unlawful search by the defendant school administrators, and that David, Judy and Dennis Tarter had been falsely imprisoned by the school administrators. The complaint also sought an order

compelling the defendant school board to reinstate David as a student at the Cuyahoga Falls High School. Defendants counterclaimed seeking costs and attorneys fees.

This suit was tried in the district court on January 3, 1983. At the close of plaintiffs' case, the district court granted a directed verdict in favor of defendants Rovnyak, Wilson and the Board of Education, and the trial continued. The district court issued its findings of fact and conclusions of law reported in *Tarter* v. *Rabuck*, 556 F. Supp. 625 (N.D. Ohio 1983), and rendered judgment in favor of defendants. In addition, the court found that plaintiff's cause of action was frivolous, unreasonable or without foundation, and awarded defendants attorneys fees pursuant to 42 U.S.C. § 1988.[1] On appeal, plaintiffs make two contentions: (1) that the district court erred in holding that the search of David Tarter was not unconstitutional; and (2) that the district court erred in awarding attorneys fees against the plaintiffs.

I.

On March 3, 1981 David Tarter was a junior at Cuyahoga Falls High School. Upon his arrival at school that morning he went to a designated smoking area in a parking lot adjacent to the high school building. That day three defendants, David Rump, the Administrative Principal, and unit principals William Raybuck and William Spargur had undertaken surveillance of the smoking area, as a result of reports previously received regarding alleged drug use and vandalism by students while in the smoking area.

The administrators observed students smoking cigarettes or marijuana, and the exchange of money and plastic bags which they believed contained marijuana, including an exchange between David Tarter and Michael Cosner. Thus, the school

[1] On June 10, 1983 the district court issued an order granting defendants $9,668.00 in attorneys fees and $1,179.90 in costs.

officials converged upon the smoking area and directed a number of students, including David Tarter, to the faculty lounge. Some students were released immediately; however, the school officials undertook questioning those students they suspected involved in illegal activity. In the meantime the local police were called to the scene. In addition, a number of students, including Tarter, were given forms to sign indicating notice of intent to suspend.

The school officials requested several students, including Tarter, to empty their coat pockets; all did so. No incriminating evidence was found on Tarter. However, Raybuck testified he detected an odor of marijuana on Tarter's breath. Thereafter, Unit Principal Raybuck informed Tarter and three others that they were going to be suspended. He then left to attempt to call the parents or guardian of each student.

During the course of these events, the police arrived, conducted a search of several students, and took several away. Mr. Raybuck then took David Tarter to the office, and after a conversation with William Spargur, advised Tarter of what he had seen, and indicated the belief that Tarter had sold marijuana to Michael Cosner. Mr. Raybuck informed David Tarter that he wished to conduct a further search. He then took Tarter to the "clinic", a small room near the office, to conduct the search. Defendant Spargur was also present while Ms. Rovnyak stood outside the door of the "clinic". Pursuant to defendant's request, David Tarter emptied his pockets, removed his jacket, boots and shirt. No incriminating evidence was found. Raybuck and Spargur then asked Tarter to remove his pants; Tarter refused, the search ceased, and the police were summoned.[2]

---

[2] The defendants' request to have plaintiff remove his pants was apparently based upon events which transpired earlier in the day. The district court noted:

> In an earlier confrontation on the morning of March 3, 1981. the defendant William Spargur was handed a plastic bag of marijuana cigarettes concealed under the the trousers of student Dave Richardson who had been seen engaging in an

A few minutes later, David's parents arrived and entered the clinic. Defendants Ms. Rovnyak and Mr. Rump also entered the clinic at this time. During discussions concerning the morning's events, the Tarter parents were advised that the police had been summoned. Mr. Tarter advised his son to put on his clothes, and stated that they were going home. The school officials requested they wait until the police arrived; the Tarters refused. According to the district court's findings, the plaintiffs "left the premises without interference from any of the defendants." 556 F. Supp. at 628.

On March 3, 1981, the day of the incident in question, David Tarter was suspended from school for a period of ten days for possession and/or use of marijuana based upon the observations of defendants Raybuck, Spargur and Rump.

David Tarter was subsequently expelled for the balance of the semester by the Superintendent of Schools. The Cuyahoga Falls School Board conducted a hearing on David Tarter's appeal of the expulsion, and affirmed the decision of the Superintendent. The Tarters were represented by counsel at the hearing.

II.

Plaintiffs challenge the constitutionality of the school officials' search of David Tarter. Thus, we are presented with the question of the role of the fourth amendment in the context

---

exchange of what appeared to be marijuana cigarettes with a student in a transaction separate from the Tarter-Cosner exchange.

Prior to the Spargur-Raybuck-Tarter confrontation in the clinic, William Raybuck was present when an officer of the Cuyahoga Falls Police Department began a search of Greg Kmet, another student observed smoking marijuana in the pit on March 3, 1981. The police officer asked Kmet to unbotton his pants. After Kmet complied, with some hesitation, and lowered his pants, the police officer and Raybuck observed a big bulge in his underwear which was patted by the police officer with ensuing crinkling-like paper sound. At that point Kmet stated, "You're not searching me any more," and bolted from the school with the police officer in pursuit.

556 F. Supp. at 627.

of the public school system. More precisely, we consider whether defendants Raybuck and Spargur violated David Tarter's constitutional rights when they searched his person on the premises of Cuyahoga Falls High School on March 3, 1981.

The district court concluded David Tarter "consented to the search conducted by and at the request of defendants Raybuck and Spargur . . . [and] the ensuing search did not violate a constitutionally protected right of the plaintiff David Tarter." 556 F. Supp. at 628. Alternatively, it addressed the question of the reasonableness of the search in the context of the fourth amendment constraints "assuming arguendo that the plaintiff David Tarter was intimidated by the presence of his high school principals to consent involuntarily to the search. . . ." *Id.* at 629. The court concluded the search was reasonable under the circumstances, and even assuming the absence of consent David Tarter's fourth amendment rights were not violated. *Id.* at 630.

We are not as convinced as the district court that David Tarter knowingly and intelligently waived his constitutional rights when he "consented" to be searched, and we are not inclined to resolve this case on the basis of consent. The burden would be upon defendants to demonstrate such a voluntary relinquishment of constitutional rights by plaintiff. There is a presumption against the waiver of constitutional rights. That he may have acquiesced in the initial search does not necessarily demonstrate the relinquishment of his rights to challenge his initial search. In fact, David Tarter's testimony indicates he only submitted to the search because he was afraid. Furthermore, there is no indication he even was aware that he might have had a constitutional right to object to a search. His eventual refusal to be strip-searched fully is not necessarily an indication of a waiver of his rights, rather it is equally likely that personal modesty or embarrassment resulted in his ultimate refusal to permit the search to continue.

It is beyond peradventure that school children do not shed their constitutional rights at the school house gate. *Tinker* v. *Des Moines Independent Comm. School Dist.*, 393 U.S. 503, 506 (1969). It is well recognized that school officials are subject to constitutional restraints as state officials. *See, e.g., Goss* v. *Lopez*, 419 U.S. 565 (1975) (due process hearing rights for school suspensions); *Tinker, supra.* (First Amendment rights available to students subject to application in light of special circumstances of the school environment). School officials, employed and paid by the state and supervising children, are agents of the government and are constrained by the Fourth Amendment. *Horton* v. *Goose Creek Indep. School District*, 690 F.2d 470 (5th Cir. 1982) *cert. denied*, 103 S.Ct. 3536 (1983) (per curiam) (challenge to the use of canine contraband detection program); *State in Interest of T.L.O.*, 94 N.J. 331, 463 A.2d 934, 943 (1983) *cert. granted; sub nom. State of New Jersey* v. *T.L.O.*, 104 S.Ct. 480 (1983) *scheduled for reargument* 52 U.S.L.W. 3935 (June 26, 1984).[3] *Accord. Bellnier* v. *Lund*, 438 F.Supp 47 (N.D.N.Y. 1977); *State* v. *Young*, 234 Ga. 488, 216 S.E.2d 586, *cert. denied*, 423 U.S. 1039 (1975); *People* v. *Scott*, 34 N.Y. 2d 483, 358 N.Y.S. 2d 403, 315 N.E. 2d 466 (1974).[4]

---

[3] Unlike this case the *New Jersey* case initially presented the question of whether the exclusionary rule barred the use in a criminal proceeding of evidence obtained in a search of the student by a school official. In scheduling the case for reargument, the Court asked the parties to brief and argue the following question: "Did the assistant principal violate the Fourth Amendment in opening respondent's [student's] purse in the facts and circumstances of this case?" Although not in the context of an action pursuant to 42 U.S.C. § 1983, the Supreme Court next term will consider virtually the same question presented to this Court in the case at bar.

[4] Some courts have avoided the application of fourth amendment principles to school teachers and administrators under the doctrine of *in loco parentis*. *See Mercer* v. *State*, 450 S.W. 2d 715 (Tex. Civ. App. 1970). Under this theory the school official does not act as an agent of the state, rather he stands "in the shoes of the parent." and thus is not constrained by the fourth amendment. *See generally* Trosch, Williams & DeVore, "Public School Searches and the Fourth Amendment," 11 J. Law & Educ. 41, 44-45 (1982). This reasoning is unsound and we reject it as have courts and commentators. *See*

The fourth amendment provides: "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable searches and seizures, shall not be violated and no warrants shall issue but upon probable cause. . . ." "The basic purpose of this Amendment, as recognized in countless decisions of this Court, is to safeguard the privacy and security of individuals against arbitrary invasions by government officials." *Camara* v. *Municipal Court*, 387 U.S. 523, 528 (1967) (warrantless administrative search of private residence).

However, the basic concern of the fourth amendment is reasonableness, *see Terry* v. *Ohio*, 392 U.S. 1, 19 (1968), and reasonableness depends upon the particular circumstances. Although incursions on the fourth amendment should be guarded jealously, not infrequently the ordinary requirements of the fourth amendment are modified to deal with special circumstances. *See, e.g., Marshall* v. *Barlow's Inc.*, 436 U.S. 307 (1978) (administrative search); *Terry* v. *Ohio*, 392 U.S. 1 (1968) ("stop and frisk" search upon reasonable suspicion); *Camera, supra.*

Thus, as other courts have done, we balance the fourth amendment rights of individual students with the interest of the state and the school officials in the maintenance of a proper educational environment to educate today's youth. *See, e.g., Horton, supra*, 690 F.2d at 480; *State in the Interest of T.L.O., supra.* For an interesting discussion of the balancing approach concept see Trosch, Williams and DeVore, "Public School Searches and the Fourth Amendment," 11 J. Law & Educ. 41, 50 (1982). Indeed, as the Supreme Court has emphasized "education is perhaps the most important function of state and

---

cases cited in text immediately preceding this note. *See also* 3 LaFave, *Search and Seizure*, § 10, 11 (1978); Buss "The Fourth Amendment and Searches of Students in Public Schools," 59 Iowa L.Rev. 739, 767 (1974). As the court in *Horton, supra*, noted: "We think it beyond question that the school official . . . is an agent of the government and is constrained by the fourth amendment." 690 F.2d at 480.

local governments." *Brown* v. *Board of Education*, 347 U.S. 483, 493 (1954).

The Fifth Circuit has noted:

> The public school presents special circumstances that demand similar accommodations of the usual fourth amendment requirements. When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, it assumes a duty to protect them from dangers posed by anti-social activities– their own and those of other students – and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers.

Horton, supra, 690 F.2d at 480 (footnote omitted). *See also People* v. *Overton*, 20 N.Y. 2d 360, 283 N.Y.S. 2d 22, 229 N.E. 2d 596 (1967). ("[S]chool authorities have an obligation to maintain discipline over the students . . . . Parents, who surrender their children to this type of environment, in order that they may continue development both intellectually and socially, have a right to except certain safeguards . . . . Thus, it is the affirmative obligation of the school authorities to investigate any charge that a student is using or possessing narcotics and to take appropriate steps if the charge is substantiated.")

Thus, we balance the fourth amendment interests of David Tarter with the legitimate concerns of public school officials in maintaining an orderly school conducive to the educational advancement of its students and determine when a school official may search a student in the absence of a warrant.

The prevailing view is that school officials may constitutionally conduct a search directed at a student under their supervision upon a quantum of evidence short of that which is needed for the usual police search. *Horton, supra*, 690 F.2d at 481. *See* 3 LaFave, *Search and Seizure*, § 10.11, at 456 (1978).

Typically the quantum of evidence is characterized as "reasonable cause" or "reasonable suspicion." *See Horton, supra,* at 481; LaFave, *supra,* § 10.11 at 456 and cases cited therein.

We hold that a school official or teacher's reasonable search of a student's person does not violate the student's fourth amendment rights, if the school official has reasonable cause to believe the search is necessary in the furtherance of maintaining school discipline and order, or his duty to maintain a safe environment conducive to education. *Cf. Horton* v. *Goose Creek, supra,* 690 F.2d at 480; *State in the Interest of T.L.O., supra,* 463 A.2d at 941; *State* v. *McKinnon,* 88 Wash. 2d 75, 81, 558 P.2d 781, 784 (1977) (search reasonable if school official has reasonable grounds to believe search is necessary in the aid of maintaining school discipline and order). We note that not only must there be a reasonable ground to institute the search, the search itself must be reasonable. Thus, for example, the authority of the school official would not justify a degrading body cavity search of a youth in order to determine whether a student was in possession of contraband in violation of school rules. There the fourth amendment and privacy interests of the youth would clearly outweigh any interest in school discipline or order which might be served by such a search. In *Doe* v. *Renfrow,* 631 F.2d 91, 92-93 (7th Cir. 1980) *cert. denied,* 451 U.S. 1022 (1981) the court noted: "[i]t does not require a constitutional scholar to conclude that a nude search of a thirteen-year-old child is an invasion of constitutional rights of some magnitude. More than that: it is a violation of any known principle of human decency."[5] "We suggest as strongly as possible that the conduct herein described exceeded the 'bounds of reason' by two and a half country miles." 631 F.2d at 93.[6]

[5] In *Doe* v. *Renfrow* the district court had determined that defendants had no reasonable cause to believe plaintiff possessed contraband. 631 F.2d at 92.

[6] The Seventh Circuit in *Doe* considered and rejected the district court's position in that case that defendants were entitled to "good

The determination of whether a school official's search is reasonable and based upon reasonable cause must be determined upon the facts and circumstances of each particular case. However, we caution to note that federal courts should not become entwined in the day to day decision making of teachers and school administrators. *Wood* v. *Strickland, supra* at 326. The responsible school official must be afforded the necessary discretion to carry out his duties.

The defendants in this case, Raybuck and Spargur, themselves had observed activity they reasonably believed to indicate the use and sale of marijuana, activity which plainly constituted a violation of a well established policy. Thus, they had personally observed the incident, and had particularized suspicion of specific individuals including David Tarter. Furthermore, they were not making a general search of a large group of students. *Cf. Horton, supra; Renfrow, supra.* The information they had – their personal observations – was obviously reliable. In addition to their personal observations, another student, Michael Cosner, claimed he had purchased a marijuana cigarette from a student he identified in the school yearbook as David Tarter. 556 F.Supp. at 627.

Accordingly, we hold that under the particular circumstances of this case the school officials had reasonable cause to search the plaintiff. Furthermore, the search actually conducted in this case itself was reasonable under the circumstances.

Plaintiffs contend the district court's reliance on the *Horton* standard is misplaced because the Fifth Circuit in *Horton* specifically limited its decision stating:

---

faith" immunity from damages under the doctrine of *Wood* v. *Strickland*, 420 U.S. 308 (1975) *reh'g denied* 421 U.S. 921 (1975) which held that in the context of school discipline a school board member will only be liable for a damage award in a § 1983 action if he acted with an impermissible motivation or with such disregard of the student's clearly established constitutional rights that his action cannot be reasonably characterized as being in good faith.

The district court in the case at bar did not address the immunity issue, nor do we. *See infra*, note 7.

> We intimate no opinion as to the standards to be applied when a school official acts at the request of police, calls in the police before searching, or turns over the fruits of his search to the police. In that situation, when there is some component of law enforcement activity in the school official's action, the considerations may be critically different.

Horton, 690 F.2d at 481, n. 19.

In this case, the Tarters correctly point out, the police had been summoned to the scene and had taken away two other students. In addition, the defendants had again called the police to the scene with respect to David Tarter. It should be noted, however, that the school officials were not acting on direction of the police, nor was anything from Tarter's person turned over to police. Plaintiffs argue, however, that the reasonable cause standard is not applicable and the probable cause warrant requirement should have applied because the school officials clearly intended to turn over any incriminating evidence to the police, and thus were themselves effectively acting as law enforcement officers.

Plaintiffs express a legitimate concern. The presence of the police officers does take this case purely out of the context of school officials seeking to maintain an environment conducive to the educational process as in *Horton*. Here, as is often the case, the school rules overlapped the criminal law. However, in the context of this case we decline to pass directly on the question of what fourth amendment standards would be applicable where the fruits of a search are turned over to law enforcement officials and used in proceedings against the student searched. *Cf. State in the Interest of T.L.O., supra* (adopting "reasonable cause" standard for search where fruits of search were used in proceedings against student). This case simply does not present such a question. This is not a criminal proceeding; no evidence is sought to be excluded; indeed, no incriminating evidence was ever discovered on David Tarter's

person. For a discussion of these issues see Annotation "Admissibility, in Criminal Case, of Evidence Obtained By Search Conducted By School Official or Teacher," 49 A.L.R. 3d 978 (1973), and LaFave, *supra.*

Although the police had been called with regard to David Tarter, it was because the school officials discontinued their search when David said he would not continue his "cooperation." The involvement of the police with respect to plaintiff was marginal. Their presence does not suggest that a standard other than reasonable cause ought to be adopted. For purposes of a § 1983 action for damages, we decline to draw the distinctions from *Horton* urged by appellants. The propriety of such a search in the context of excluding evidence obtained therefrom in a subsequent criminal proceeding against the student is currently a question before the Supreme Court in *New Jersey* v. *T.L.O., supra,* and is not before this Court in this § 1983 action.

We hold that Raybuck and Spargur had reasonable cause to search David Tarter under the circumstances set forth above and that the search was reasonable. Accordingly, we affirm the decision of the district court in this respect, although on grounds different from those relied on by the district court.[7]

III.

Appellants also assert the district court erred in awarding attorneys fees to the prevailing defendants pursuant to 42 U.S.C. § 1988. This statute provides the court with discretion

[7] Because we conclude that defendants had reasonable cause to conduct the search and the search itself was reasonble, we need not address the question of whether under *Wood* v. *Strickland,* 420 U.S. 308 (1975) the defendants would have been entitled to good faith immunity from an award of damages. The issue was not presented to the district court, nor was it presented to this court. *Cf. Doe* v. *Renfrow,* 631 F.2d 91, 92-93 (7th Cir. 1980), *cert. denied,* 451 U.S. 1022 (1981) wherein the Seventh Circuit reversed a ruling by the district court that defendants were immune from monetary damages under *Strickland* where the court found no reasonable cause to conduct a search of plaintiffs.

to allow the prevailing party reasonable attorneys fees.[8] Although the language of the statute does not distinguish between a prevailing plaintiff and a prevailing defendant, the legislative history and relevant case law demonstrate the standards are distinct.

The legislative history reflects the primary purpose of the provision is to provide an opportunity for private citizens to vindicate important constitutional rights. The provision passed in the Civil Rights Attorney's Fees Awards Act of 1976, P.L. 94-559, 90 Stat. 2641 was enacted in response to the Supreme Court decision of *Alyeska Pipeline Service Co.* v. *Wilderness Society*, 421 U.S. 240 (1975) applying the "American Rule" (that each party bears his own legal expenses) for attorneys fees where private parties seek to vindicate federal rights, absent a specific congressional provision granting the authority to award such fees. *See* Sen. Rep. No. 94-1011, 2-5 (1976) *reprinted in* 1976 *U.S. Code Cong. & Ad. News*, 5908, 5910-12. The Senate Report stated further:

> It is intended that the standards for awarding fees be generally the same as under the fee provisions of the 1964 Civil Rights Act. A party seeking to enforce the rights protected by the statutes covered by S. 2278, if successful, "should ordinarily recover an attorney's fee unless special circumstances would render such an award unjust." *Newman* v. *Piggie Park Enterprises, Inc.*, 390 U.S. 400, 402 (1968).
>
> • • •
>
> Such "private attorneys general" should not be deterred from bringing good faith actions to vindicate the funda-

[8] 42 U.S.C. § 1988 provides in pertinent part:

> In any action or proceeding to enforce a provision of sections 1981, 1982, 1983, 1985, and 1986 of this title, title IX of Public Law 92-318, or title VI of the Civil Rights Act of 1964, the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

> mental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose.
>
> • • •
>
> This bill thus deters frivolous suits by authorizing an award of attorneys' fees against a party shown to have litigated in "bad faith" under the guise of attempting to enforce the Federal rights created by the statutes listed in S. 2278.
>
> *Id.* at 5912 (footnote omitted).

In *Christiansburg Garment Co.* v. *EEOC*, 434 U.S. 412 (1978), the Supreme Court articulated what has become the standard basis for awarding attorneys fees to prevailing defendants in civil rights cases. The Court stated: "[A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." 434 U.S. at 421. In other language the Court stated: "a plaintiff should not be assessed his opponent's attorney's fees unless a court finds that his claim was frivolous, unreasonable, or groundless, or that the plaintiff continued to litigate after it clearly became so." *Id.* at 422.

While the Supreme Court in *Christiansburg* was addressing the question of the standard applicable to the attorneys fee provision of section 706(k) of Title VII of the Civil Rights Act of 1964, 78 Stat. 261, 42 U.S.C. § 2000e-5(k), the provisions are virtually identical to those of § 1988 at issue in this case.

In *Hughes* v. *Rowe*, 449 U.S. 5, 14-15 (1980) (per curiam) the Court applied the *Christiansburg* test in actions brought pursuant to § 1983, although the plaintiff in *Hughes* was an uncounseled prisoner, the Court's language is clear:

> In *Christiansburg Garment Co.* v. *EEOC*, 434 U. S. 412 (1978), we held that the defendant in an action brought under Title VII of the Civil Rights Act of 1964 may recover attorney's fees from the plaintiff only if the District

> Court finds "that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith." *Id.*, at 421. Although arguably a different standard might be applied in a civil rights action under 42 U. S. C. § 1983, we can perceive no reason for applying a less stringent standard. The plaintiff's action must be meritless in the sense that it is groundless or without foundation. The fact that a plaintiff may ultimately lose his case is not in itself a sufficient justification for the assessment of fees.

Id. at 14.

The application of the *Christiansburg* standard for the award of attorneys fees to defendants under § 1988 has been adopted by numerous courts. *See e.g. Campbell* v. *Cook*, 706 F.2d 1084, 1086 (10th Cir. 1983); *Doe* v. *Busbee*, 684 F.2d 1375, 1378-80 (11th Cir. 1982); *Werch* v. *City of Berlin*, 673 F.2d 192 (7th Cir. 1982); *Reichenberger* v. *Pritchard*, 660 F.2d 280 (7th Cir. 1981); *Bowers* v. *Kraft Foods Corp.*, 606 F.2d 816 (8th Cir. 1979); *Lopez* v. *Aransas County Indep. School Dist.*, 570 F.2d 541 (5th Cir. 1978).

The Supreme Court's test in *Christiansburg*, *supra*, however, must be read in context with other language in the Court's opinion stressing that the underlying purposes of § 1983 and § 1988 not be undermined in awarding fees to prevailing defendants too freely. The Supreme Court cautioned:

> In applying these criteria, it is important that a district court resist the understandable temptation to engage in *post hoc* reasoning by concluding that, because a plaintiff did not ultimately prevail, his action must have been unreasonable or without foundation. This kind of hindsight logic could discourage all but the most airtight claims, for seldom can a prospective plaintiff be sure of ultimate success. No matter how honest one's belief that he has been the victim of discrimination, no matter how meritorious one's claim may appear at the outset, the course of litigation is rarely predictable. Decisive facts

> may not emerge until discovery or trial. The law may change or clarify in the midst of litigation. Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit.

434 U.S. at 421-422.

The decision to award attorney's fees is committed to the discretion of the trial judge. 42 U.S.C. § 1988; *Christiansburg Garment*, 434 U.S. at 421; *Harrington* v. *DeVito*, 656 F.2d 264, 266 (7th Cir. 1981); *Obin* v. *District 9 of Internat. Ass'n, Etc.*, 651 F.2d 574 (8th Cir. 1981); *Muscare* v. *Quinn*, 614 F.2d 577, 579-80 (7th Cir. 1980); *Konczak* v. *Tyrell*, 603 F.2d 13, 19 (7th Cir. 1979), *cert. denied*, 444 U.S. 1016 (1980) as is the amount of the fee award. *Hensley* v. *Eckerhart*, — U.S. —, 103 S.Ct. 1933, 1941 (1983). The standard of appellate review of a district court's award of attorney's fees to a prevailing party under § 1988 is whether the trial court abused its discretion in making or denying the award. *Reichenberger* v. *Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981) (award to prevailing defendants); *Olitsky* v. *O'Malley*, 597 F.2d 303, 305 (1st Cir. 1979). *See Christiansburg Garment, supra*, 434 U.S. at 421, 424; *Tonti* v. *Petropoulous*, 656 F.2d 212, 217 (6th Cir. 1981); *Obin* v. *District 9 of Internat. Ass'n, Etc.*, 651 F.2d 574, 586 (8th Cir. 1981).

The Seventh Circuit has articulated several factors an appellate court may consider when determining whether the trial court properly exercised its discretion in applying the *Christiansburg* standards:

> In seeking to determine whether a suit is frivolous, unreasonable or groundless, courts have focused on several factors. Among those considered are whether the issue is one of first impression requiring judicial resolution, *Christiansburg*, 434 U.S. at 423-24, 98 S.Ct. at 701; whether the controversy is sufficiently based upon a real threat of injury to the plaintiff, *Olitsky*, 597 F.2d at 305; whether

> the trial court has made a finding that the suit was frivolous under the *Christiansburg* guidelines, and whether the record would support such a finding, *see, e. g., Vorbeck* v. *Whaley*, 620 F.2d 191, 193 (8th Cir. 1980).

Reichenberger v. *Pritchard*, 660 F.2d 280, 288 (7th Cir. 1981).

We examine the district court's award of attorneys fees, cognizant of the Supreme Court's heed of caution regarding the award of fees to a prevailing defendant articulated in *Christiansburg;* mindful of the legislative history of 42 U.S.C. § 1988 in the context of the overall purpose behind the civil rights provisions; aware of the factors articulated by the Seventh Circuit in *Reichenberger*, and with due recognition of the limited scope of our review.

The distirct court recognized that the *Christiansburg* standard was the appropriate standard for determining whether defendants were entitled to attorneys fees under § 1988. *Tarter* v. *Raybuck*, 556 F. Supp. 625, 631 (N.D. Ohio 1983). The district court then examined plaintiff's complaint in light of this standard. With respect to the expulsion of David Tarter and plaintiffs' prayer for an order compelling defendants to readmit David to school, the district court wrote:

> Pursuant to R.C. 3313.66 et seq., the plaintiff parents appealed the expulsion to the Board of Education of Cuyahoga Falls. Considerable testimony was taken with respect to that appeal. See Exhibit H. A study of the record of the expulsion hearing before the Board of Education fails to reveal any factual basis to warrant the filing of a complaint alleging conduct on the part of the defendants actionable under 42 U.S.C. § 1983.
>
> The plaintiffs' complaint prayed for relief including an order from this Court compelling the defendant school board and defendant school administrators to permit the plaintiff David Tarter to reenter Cuyahoga Falls High School. The complaint was filed in September of 1981 after David Tarter, as a matter of law, was eligible to return to school because his expulsion was

> for only the semester, consistent with the provisions of Ohio Revised Code § 3313.66. The fact that the expulsion was for only the period of a semester was clearly indicated by a letter mailed to the plaintiffs following the expulsion. See Exhibit 5. Nonetheless, the student David Tarter made no attempt to reenter Cuyahoga Falls High School. His parents failed to make any inquiry on behalf of David Tarter calculated to bring about his reentry into Cuyahoga Falls High School. The defendants took no action which in any way could have been construed as an attempt to prohibit David Tarter from returning to Cuyahoga Falls High School.

556 F. Supp. at 631-32.

It was readily apparent from the letter to plaintiffs from the Superintendent of Schools that the expulsion was for the balance of the spring 1981 semester. Thus the complaint, not filed until September 1981, was meritless to the extent it sought an order to compel defendants to permit David Tarter to reenter Cuyahoga Falls High School. Nothing was ever alleged or shown which might have conceivably been characterized as action by defendants to deny David Tarter reentry.

Furthermore, we entirely agree with the district court that the "claim that David Tarter and his parents were wrongfully detained in the high school clinic is patently without merit." 556 F. Supp. at 632.

We turn then to the district court's discussion of the merits of plaintiffs' fourth amendment claim. The district court's only consideration of awarding attorneys fees to defendant with respect to the search issue was as follows:

> It is without dispute that the search of David Tarter on the morning of March 3, 1981, ceased immediately upon his revocation of the consent that he had earlier given to a search of his person.

556 F. Supp. at 632.

As previously stated we are not inclined to resolve this case on the finding that David Tarter freely consented to the search. In examining this claim in light of standards enunciated in *Christiansburg*, we hold the district court abused its discretion in awarding attorneys fees to defendants in this case. First, we cannot conclude that this action was wholly meritless or without foundation. *See Christiansburg, supra.* We specifically note that the issue of a student's fourth amendment rights in the context of a search by a school official is not a well settled area of the law in the country or in this circuit. This factor mitigates against an award to defendants. *See Reichenberger, supra.* Indeed, the United States Supreme Court has scheduled for reargument next term a case which may address directly a factual situation not unlike the case at bar. The question the Court has directed to be considered in ordering reargument is essentially whether an assistant principal violated a student's fourth amendment rights when he searched her purse based upon information from a teacher that the student had been smoking in the girl's bathroom in contravention of school rules. *See New Jersey* v. *T.L.O.*, 52 U.S.L.W. 3935 (June 26, 1984) scheduling the case for reargument.[9] Finally, as suggested in *Reichenberger, supra*, the district court did make a finding that the suit was frivolous under the *Christiansburg* guidelines. However, we cannot conclude the record adequately supports such a finding. The district court's analysis of the award with respect to the fourth amendment claim was limited only to his determination that because consent was freely given, plaintiff's claim was groundless. 556 F. Supp. at 632. As we have previously discussed, plaintiffs' case was not so easily resolved. Although plaintiffs' claim ultimately proved unsuccessful, it was not so meritless or without foun-

[9] As noted, *supra* at Note 3, the issue was not initially before the Court. Rather the issue initially presented was only whether the exclusionary rule applied where the state sought to introduce that evidence in a subsequent criminal proceeding.

dation that defendant was properly awarded attorney's fees as the prevailing party in this case in light of the legislative history behind section 1988, the Civil Rights statutes, and the *Christiansburg* standards enunciated by the Supreme Court.

Christiansburg warns that judges not engage in *post hoc* reasoning to justify such an award. 434 U.S. at 422. "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." *Id.* "Decisive facts may not emerge until discovery or trial." *Id.*

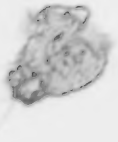
We conclude this lawsuit is the type of case contemplated by the Supreme Court in enunciating the words of caution just quoted. The issue of consent was reasonably in dispute given the context of the purported waiver of important constitutional rights. The exact nature and extent of a student's fourth amendment rights are not well settled. Furthermore, there is no definitive standard established on when school officials may undertake incursions on traditional fourth amendment protections, in order to maintain school order and discipline. Also, the presence of the police at the high school surrounding the time of the incident in question raised a legitimate question of whether the standard of conduct of the school officials was the same as for police officials. That the district court or this court ultimately declined to adopt the positions urged by plaintiffs on these questions is not tantamount to concluding defendants are entitled to an attorneys fees award under section 1988.

We hold therefore, that the district court abused its discretion in awarding defendants judgment on their counterclaim for attorneys fees pursuant to 42 U.S.C. § 1988.

VI.

We conclude that there was reasonable cause for the defendants to conduct a search of David Tarter under the circumstances of this case, and the extent of the search

actually undertaken was reasonable. Thus, we affirm the district court in rendering judgment in favor of defendants with respect to the claims of plaintiffs. However, we conclude the district court abused its discretion rendering judgment in favor of defendants on their counter-claim for attorneys fees pursuant to 42 U.S.C. § 1988. The judgment of the district court is *affirmed* in part and *reversed* in part. Both sides will bear their own costs on this appeal.



UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID TARTER, et al.,	)	**CASE NO. C81-1891A**
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
WILLIAM RAYBUCK, et al.,	)	*MEMORANDUM*
	)	
Defendants.	)	*OPINION*

The plaintiffs, David Tarter, a student at Cuyahoga Falls High School, and his parents, Dennis and Judy Tarter, filed a complaint alleging that certain of their constitutional rights were violated by five school administrators and the Board of Education of Cuyahoga Falls[1] in March of 1981. The action is brought pursuant to the provisions of 42 U.S.C. §1983.

Neither party requested a jury. The case was tried to the Court in a bench trial and subsequently briefed by the parties.

The Court makes the following findings of fact and conclusions of law.

FINDINGS OF FACT

1. On March 3, 1981, plaintiff David Tarter was enrolled as a student in the junior class of Cuyahoga Falls High School.

2. A designated smoking area has been provided for high school students in an area known as the "pit" in a parking lot adjacent to Cuyahoga Falls High School.

3. Prior to March 3, 1981, reports had been received by the Cuyahoga Falls High School Administration regarding

[1]The motions for a directed verdict at the conclusion of the plaintiffs' case by Dr. Wilson, the superintendent of the school system and Miss Rovnyak and the Board of Education were sustained.

alleged drug use and vandalism by students while located in the "pit".

4. As a result of the reports, three administrators of the high school, David Rump, as the Administrative Principal, and defendant unit principals, William Raybuck and William Spargur, met early on the morning of March 3, 1981, and assembled in concealed surveillance positions within the high school to observe student activity in the smoking pit.

5. Rump, Raybuck and Spargur observed a number of high school students passing and smoking marijuana joints or cigarettes and the exchange of money and plastic bags which appeared to contain marijuana cigarettes of joints.

6. The plaintiff, David Tarter, was observed by defendants Raybuck and Spargur while standing in a circle of students to smoke a marijuana joint and to exchange a plastic bag and money with another Cuyahoga Falls student, Michael Cosner.

7. As a result of the observations, the defendants Rump, Raybuck and Spargur went to the pit simultaneously and directed a number of the students, including the plaintiff, into the high school building.

8. Some of the students were questioned first by high school officials and then searched by police officials who arrived at the request of the high school officials.

9. David Tarter was taken to the high school clinic and questioned by the defendants Raybuck and Spargur regarding his activity in the smoking pit. Raybuck detected the odor of marijuana on the breath of David Tarter.

10. Prior to the confrontation of Tarter, the defendant William Spargur met with and questioned Michael Cosner after retrieving a marijuana joint in the area of the smoking pit, which Cosner had thrown away as Spargur approached. Cosner claimed that he had purchased marijuana cigarettes while in the smoking pit from a student whom he identified from the school yearbook as the plaintiff Tarter.

11. The defendant Spargur informed the defendant Raybuck of his conversation with Cosner prior to the Tarter confrontation.

12. Raybuck, upon confronting the plaintiff Tarter, ad-

vised Tarter of what Raybuck had seen including the Tarter-Cosner exchange and the receipt of subsequent information that Tarter had been the seller in the Tarter-Cosner exchange. Raybuck advised Tarter that they wanted to conduct a search of Tarter.

13. Tarter voluntarily complied with the request of William Raybuck and produced the contents of his pockets and boots which disclosed no evidence of marijuana.

14. In an earlier confrontation on the morning of March 3, 1981, the defendant William Spargur was handed a plastic bag of marijuana cigarettes concealed under the trousers of student Dave Richardson who had been seen engaging in an exchange of what appeared to be marijuana cigarettes with a student in a transaction separate from the Tarter-Cosner exchange.

15. Prior to the Spargur-Raybuck-Tarter confrontation in the clinic, William Raybuck was present when an officer of the Cuyahoga Falls Police Department began a search of Greg Kmet, another student observed smoking marijuana in the pit on March 3, 1981. The police officer asked Kmet to unbutton his pants. After Kmet complied, with some hesitation, and lowered his pants, the police officer and Raybuck observed a big bulge in his underwear which was patted by the police officer with ensuing crinkling-like paper sound. At that point Kmet stated, "You're not searching me any more," and bolted from the school with the police officer in pursuit.

16. Against the background of the Richardson-Kmet discoveries, Raybuck and Spargur requested Tarter to unfasten and lower his trousers for inspection. However, the plaintiff David Tarter refused to comply with the request. Raybuck and Spargur ceased their search and requested that Cuyahoga Falls Police Department be requested to return to the school.

17. Following the observations by the principals of the students in the pit and prior to the confrontation of Tarter by Spargur and Raybuck, the defendant William Raybuck notified plaintiff Judy Tarter, the mother of David Tarter, of the observations in the pit and requested Mrs. Tarter come to the high school.

18. Dennis and Judy Tarter, parents of David Tarter, arrived at Cuyahoga Falls High School after the plaintiff David Tarter advised defendants Raybuck and Spargur that he would not permit a search of his trousers.

19. Dennis and Judy Tarter were taken to the high school clinic where David Tarter and defendants Raybuck and Spargur were located. The group was joined by the defendants Rump and Rovnyak.

20. While the plaintiffs and the defendants Raybuck, Spargur, Rovnyak and Rump were in the clinic, a discussion ensued concerning the occurrences on March 3, 1981.

21. The plaintiffs were advised that the Cuyahoga Falls Police Department had been summoned. The plaintiffs announced they were leaving the building. The plaintiffs were requested to wait but refused and immediately left the premises without interference from any of the defendants.

22. During the 1980-81 school year, the Cuyahoga Falls City School District Board of Education had in effect a code of student conduct and discipline procedure which was made known to students in the Cuyahoga Falls High School. Under that code, the possession and/or use of drugs was prohibited and subject to suspension and/or expulsion action. The adoption and enforcement of the conduct code and discipline procedure was pursuant to and in compliance with Sections 3313.66 and 3313.661, Ohio Revised Code.

23. On March 3, 1981, David Tarter was suspended from school for ten (10) days for possession and/or use of marijuana based upon the observations of Defendants Raybuck, Spargur and Rump and the detectible odor of marijuana on the breath of David Tarter as observed by Defendant Raybuck.

24. Subsequent to the morning of March 3, 1981, David Tarter was suspended and ultimately expelled from attendance at the Cuyahoga Falls High School for the remainder of the semester for sale or purchase of drugs, use of marijuana, habitual truancy, and extensive discipline record for the 1980-81 school year.

25. On April 1, 1981, a hearing was held before the Cuyahoga Falls City School District Board of Education on

David Tarter's appeal of the expulsion decision of the Superintendent. After hearing all of the evidence presented by the Administration of the Cuyahoga Falls High School, Dennis and Judy Tarter, and their attorney, the Board of Education upheld the expulsion decision of the Superintendent. David Tarter neither attended nor testified at the expulsion appeal hearing.

26. David Tarter has not enrolled in the Cuyahoga Falls School District or any other school district after the expiration of the term of his expulsion.

27. The defendants throughout the events described above acted under the color of state law.

28. Other than for the fact of the plaintiff David Tarter's expulsion from the second semester of the 1980-81 school year, the damages suffered by the plaintiffs were nominal in nature.

CONCLUSIONS OF LAW

1. The search of a student conducted by and at the request of a high school principal does not constitute an infringement of a constitutionally protected right of the student where the student consents to the search.

2. The plaintiff David Tarter having consented to the search conducted by and at the request of defendants Raybuck and Spargur, principals of Cuyahoga Falls High School, the ensuing search did not violate a constitutionally protected right of the plaintiff David Tarter.

3. The search of David Tarter conducted by the defendants Raybuck and Spargur following Raybuck and Spargur's observations of the activities in the pit and the declarations of Tarter's fellow student, Michael Cosner, was reasonable in the context of Fourth Amendment constraints. See *Horton v. Goose Creek Independent School District*, 677 F.2d 471, 483 (5th Cir. 1982).

4. The request of the defendants Raybuck, Spargur and Rump that the plaintiffs remain in the high school clinic did not constitute false imprisonment as the mobility of the plaintiffs was not impeded or hindered, nor did the defendants act in any manner which would have reasonably given

rise to the belief on the part of one or more of the plaintiffs that their mobility was impeded or hindered.

5. The expulsion of the plaintiff David Tarter from the balance of the second semester in the school year 1980-81 at Cuyahoga Falls High School was in compliance with due process of law and the provisions of R.C. §3313.66 et seq.

6. The plaintiffs failed to prove any conduct on the part of any of the defendants that would support a judgment for either compensatory or punitive damages.

CONTINUATION OF OPINION

The decision of the administrators of Cuyahoga Falls High School to employ self help in an attempt to abate rumored illegal drug activity on the school grounds resulted in the expulsion of numerous students including the plaintiff David Tarter. Subsequently, the plaintiffs began this action claiming that conduct of the administrators violated their constitutional rights. First the plaintiffs challenged the search of David Tarter as constituting a violation of his Fourth Amendment right to be free from an unlawful search and seizure. Secondly, the plaintiffs claimed they were falsely imprisoned while located in the high school clinic with several of the administrators. Finally, the complaint challenged, on constitutional grounds, the procedure by which David Tarter was expelled from Cuyahoga Falls High School for the balance of the second semester of his junior year.

At trial, no attempt was made to attack the expulsion procedures. Rather, the plaintiffs prosecuted claims of an unconstitutional search of the student-plaintiff, David Tarter, and the false imprisonment of all three plaintiffs.

With respect to the claim of the violation of David Tarter's Fourth Amendment rights, this Court has found, as set forth in the findings of fact, that the plaintiff David Tarter freely and voluntarily consented to a search of his person to the extent that a search was conducted. But assuming arguendo that the plaintiff David Tarter was intimidated by the presence of his high school principals to consent involuntarily to the search, such a finding would not

not render the search unconstitutional without further inquiry. Rather, under such circumstances, the issue would be whether the decision of the high school principals to undertake the search of plaintiff, David Tarter, on the morning of March 3, 1981, was, under all the circumstances, as known by the defendant-principals Raybuck and Spargur, reasonable in the context of Fourth Amendment constraints. *Horton v. Goose Creek Independence School District*, 677 F.2d 471 (5th Cir. 1982), at page 483 addresses the issue of the interplay between the Fourth Amendment rights of the student and the duties and powers of teachers and school administrators with respect to searches of students on school premises. The Court stated:

> . . . The basic concern of the fourth amendment is reasonableness, and reasonableness depends on the circumstances. Often the ordinary requirements of the fourth amendment are modified to deal with special situations . . . . [Citations omitted] The public school presents special circumstances that demand similar accommodations of the usual fourth amendment requirements. When society requires large groups of students, too young to be considered capable of mature restraint in their use of illegal substances or dangerous instrumentalities, to congregate in the public schools, it assumes a duty to protect them from dangers posed by anti-social activities - their own and those of other students - and to provide them with an environment in which education is possible. To fulfill that duty, teachers and school administrators must have broad supervisory and disciplinary powers. At the same time, though, we must protect the fourth amendment rights of students . . .
>
> When the school official acts in furtherance of his duty to maintain a safe environment conducive to education, the usual accommodation is to require that the school official have "reasonable cause" for his action . . . . 677 F.2d at 483-84.

Applying the test of *Horton, supra,* to the facts at hand, it is apparent that the defendants Raybuck and Spargur, acting as high school principals with responsibility for the control and discipline of the students at Cuyahoga Falls High School, and taking into consideration all of the information that they had acquired prior to their attempt to commence a search of David Tarter acted reasonably in connection with the search of David Tarter on March 3, 1981. Consequently, even assuming the absence of David Tarter's consent to the search of his person to the extent that a search was conducted, his Fourth Amendment constitutional rights were not violated by defendants Raybuck and Spargur. The action of Raybuck and Spargur was reasonable in view of the following circumstances. They had observed Tarter to engage in what reasonably appeared to be the smoking of marijuana cigarette. They had observed an exchange between Tarter and Cosner of money and what appeared to be a package of marijuana cigarettes. Cosner had identified Tarter as the person selling him marijuana. Raybuck had smelled the odor of marijuana on Tarter's breath. Raybuck and Spargur each observed that other Cuyahoga Falls high school male students has concealed containers of marijuana cigarettes in their trousers or underwear. Under such circumstances, and given the duties and responsibilities of Spargur and Raybuck as principals of the high school, their decision to undertake the search of David Tarter to determine whether in fact he had concealed marijuana on his person was reasonable in the context of Fourth Amendment rights enjoyed by Tarter.

The plaintiffs' claim of false imprisonment relates to the presence of the three plaintiffs in the high school clinic at a time when the defendants, Rump, Raybuck and Spargur, were also present. The plaintiffs testified that the principal, Mr. Rump, stood next to the exit door from the clinic, and by so doing, blocked the only exit available to the plaintiffs to leave the clinic. However, when directly confronted, David Tarter stated that Mr. Rump did not resist the departure of the plaintiffs. Mrs. Tarter also testified with respect to the alleged detention as follows:

A. I felt very strained, far as--Mr. Rump was the only thing blocking the door, and I felt I could get out.
Q. So you had no problem leaving?
A. No. I knew with my husband there, I would be able to leave, yes.
Q. Once your husband announced you were leaving, there was no further attempt to make you stay?
A. No, he just kind of pushed Mr. Rump aside and we walked out.

(Tr. 46; 47)

Supplementing the testimony of the plaintiffs is the testimony of the defendants Raybuck, Spargur, Rovnyak and Rump, all of which indicates at no time were the plaintiffs subjected to false imprisonment. The plaintiffs' claim of false imprisonment is patently without merit.

Judgment is awarded the defendants with respect to the plaintiffs' claims.

DEFENDANTS' COUNTERCLAIM

The defendants have brought a counterclaim seeking reasonable attorney fees and costs under the provisions of the Civil Rights Attorney's Fees Awards Act of 1976 (Act), 42 U.S.C. §1988, Pub. L. No. 94-559 (Oct. 19, 1976), 90 Stat. 2641, as amended (not in regard to fees in §1983 cases) by Pub. L. 96-481 (Oct. 21, 1980), 94 Stat. 2330.

> In relevant part, 42 U.S.C. §1988 provides:
> In any action or proceeding to enforce a provision of sections 1981, 1982, [or] 1983 . . . the court, *in its discretion*, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs. (Emphasis added.)

It is readily apparent that the defendants are the "prevailing party" in this action. Consequently, the question is whether the Court should, in the exercise of its discretion, allow reasonable attorneys fees.

Although the terms of the Act suggest that a defendant, as the prevailing party, is entitled to reasonable attorney's fees, the statute has been interpreted to set a higher

standard for an award of attorney's fees to a defendant. The Senate Report on the Act stated that:

> It is intended that the standards for awarding fees be generally the same as under the 1964 Civil Rights Act . . . . [Plaintiffs] should not be deterred from bringing *good faith actions* to vindicate the fundamental rights here involved by the prospect of having to pay their opponent's counsel fees should they lose. Such a party, if unsuccessful, could be assessed his opponent's fee only where it is shown that his suit was clearly frivolous, vexatious, or brought for harassment purposes . . . ."

S. Rep. No. 94-1011, 94th Cong., 2d Sess. U.S. Code Cong. & Admin. News 1976, pp 5908, 5912 (June 29, 1976) (emphasis added, footnotes and citations omitted).

This passage indicates that Congress intended to award attorney's fees to a defendant only where the suit was "clearly frivolous, vexatious, or brought for harassment purposes." Further, this passage indicates that Congress intended for the standards developed in Title VII litigation to apply to the award of attorney's fees under §1988. See *Green v. Ten Eyck*, 572 F.2d 1233, 1243-44, n.11 (8th Cir. 1978). In the leading decision discussing an award of attorney's fees to a defendant in the Title VII action, the Supreme Court stated:

> [A] district court may in its discretion award attorney's fees to a prevailing defendant in a Title VII case upon a finding that the plaintiff's action was frivolous, unreasonable, or without foundation, even though not brought in subjective bad faith . . . or that the plaintiff continued to litigate after it clearly became so.

Christianburg Garment Co. v. Equal Employment Opportunity Commission, 434 U.S. 412, 421-22 (1978).

Upon review of the evidence in this case in light of these standards, the Court finds that this action was "frivolous, unreasonable, or without foundation . . . ." Therefore, the Court concludes that the defendants are entitled to recover

their reasonable attorney's fees under the provisions of 42 U.S.C. §1988. An analysis of the evidence supporting this conclusion follows.

Pursuant to R.C. 3313.66 et seq., the plaintiff parents appealed the expulsion to the Board of Education of Cuyahoga Falls. Considerable testimony was taken with respect to that appeal. See Exhibit H. A study of the record of the expulsion hearing before the Board of Education fails to reveal any factual basis to warrant the filing of a complaint alleging conduct on the part of the defendants actionable under 42 U.S.C. §1983.

The plaintiffs' complaint prayed for relief including an order from this Court compelling the defendant school board and defendant school administrators to permit the plaintiff David Tarter to reenter Cuyahoga Falls High School. The complaint was filed in September of 1981 after David Tarter, as a matter of law, was eligible to return to school because his expulsion was for only the semester, consistent with the provision of Ohio Revised Code §3313.66. The fact that the expulsion was for only the period of a semester was clearly indicated by a letter mailed to the plaintiffs following the expulsion. See Exhibit 5. Nonetheless, the student David Tarter made no attempt to reenter Cuyahoga Falls High School. His parents failed to make any inquiry on behalf of David Tarter calculated to bring about his reentry into Cuyahoga Falls High School. The defendants took no action which in any way could have been construed as an attempt to prohibit David Tarter from returning to Cuyahoga Falls High School.

It is without dispute that the search of David Tarter on the morning of March 3, 1981, ceased immediately upon his revocation of the consent that he had earlier given to a search of his person. David Tarter has never maintained to the contrary. The claim that David Tarter and his plaintiff parents were wrongfully detained in the high school clinic is patently without merit.

Accordingly, the Court grants judgment to the defendants on their counterclaim for reasonable attorney's fees. The Clerk of this Court is directed to schedule a hearing with

notice to all parties for the purpose of allowing the defendants to introduce evidence with respect to their reasonable attorney's fees and costs and also for the purpose of permitting the three plaintiffs to offer evidence with respect to whether reasonable attorney's fees should be assessed against all three plaintiffs equally or in some other manner.

David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID TARTER, et al.,	)	**CASE NO. C81-1891A**
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
WILLIAM RAYBUCK, et al.,	)	*JUDGMENT ENTRY*
	)	
Defendants.	)	

A directed verdict having been granted at the conclusion of the plaintiffs' case in favor of defendants Marianne Rovnyak, Harold Wilson and the Cuyahoga Falls Board of Education and against the plaintiffs,

IT IS ORDERED, ADJUDGED and DECREED that judgment is entered in favor of defendants Marianne Rovnyak, Harold Wilson and the Cuyahoga Falls Board of Education and against the plaintiffs David Tarter, Dennis Tarter and Judy Tarter on the plaintiffs' claims.

_____

David D. Dowd, Jr.
U.S. District Judge

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF OHIO
EASTERN DIVISION

DAVID TARTER, et al.,	)	**CASE NO. C81-1891A**
	)	
Plaintiffs,	)	
	)	
vs.	)	
	)	
WILLIAM RAYBUCK, et al.,	)	*ORDER*
	)	
Defendants.	)	

In its memorandum opinion of February 7, 1983, this Court granted the defendants judgment on the request for reasonable attorneys' fees. Defendants have since filed their application for reasonable attorneys fees and costs of this litigation. The Court heard oral argument on the attorneys fees applications on February 17, and February 25, 1983. For the reasons stated below, this Court grants defendants' attorneys' fees in the amount of $9668.00 and costs in the amount of $1179.90.

The leading case in the Sixth Circuit on attorneys fees awards is *Northcross v. Board of Education*, 611 F.2d 624 (6th Cir. 1979). In that case, the Court stated that:

> We conclude that a fee calculated in terms of hours of service provided is the fairest most manageable approach .... The hours claimed [by counsel] need not be automatically accepted by the district court, but to the extent that hours are rejected, the court must indicate some reason for its action, ... [H]ours may be cut for duplication, padding, or frivolous claims.

Id. at 636. The Court went on to allow the district court to make a percentage reduction of the total hours to eliminate

duplication of services. *Id.* at 636-37.

In light of this authority, the Court will now analyze defendants' application for attorneys' fees. At the outset, this Court notes that the award of reasonable attorneys fees in this case arises from the defense of a section 1983 action which this Court described as "frivolous". The case involved some relatively straight forward issues, very limited discovery, and a one day bench trial.

In sum, defendants' attorneys have sought fees of $14,016.50 for 182.2 hours of attorney time, divided between three lawyers. Upon review, this Court finds that expenditure of time was somewhat excessive. Specifically, the Court finds three areas in which defendants attorneys application is excessive. First, many of the documents filed in this litigation evidenced work by all three attorneys involved in the case, Messrs. Whalen, Compton and Minney. Upon review, this Court finds that the issues involved in this case were not sufficiently complicated to require the work of three attorneys. A reduction of hours as contemplated by *Northcross* is appropriate. Second, defendants' counsel attributed 63.7 hours of their time to review and revision of various documents. Again, the issues in this case were not sufficiently difficult to require the use of three attorneys, and this Court concludes that much of the time assigned to review and revision was duplicative. Finally, defendants' counsel assigned 24.5 hours to telephone calls and letters. While the Court is aware of the needs to consult with clients, this Court concludes that, in the context of this case, that 24.5 hours is an excessive request.

The Court concludes that it should review each portion of the litigation and each attorney's involvement in that portion of the litigation to determine a reasonable request. Below, the Court presents a list of the twelve portions of this litigation, along with a graphic presentation of the amount of attorney time which the Court finds was reasonably expended on that portion.

	Whalen	Compton	Minney
Preparation of Pleadings	2.5 hrs.	1.0 hrs.	1.0 hrs.
Answers to Interrogatories	–	2.5	–
Production of Documents	–	4.6	–
Depositions	23.2	–	–
Trial Brief	–	15.8	–
Post-trial Brief	–	20.4	–
Research	–	6.9	–
Review & Revision of Documents	5.8	13.7	5.6
Filing depositions & subpoenas	–	5.4	–
Preparation of atty. fee application	.3	3.7	3.1
Client consultation	4.0	–	–
Court appearance & trial time	20.0	–	–
Total Time	55.8	74.0	9.7

The Court has set what it believes to be the reasonable hourly rate for each of defendants' attorneys. Although defendants' attorneys' rates changed during this litigation, this Court has adopted an average rate, adjusted to comport with what the Court believes to be the reasonable rate for each attorney's services. The Court concludes that Mr. Whalen's time should be compensated at $85.00 per hour, Mr. Compton's time at $60.00 per hour, and Mr. Minney's time at $50.00 per hour. The calculations are set forth below.

Whalen	55.8 hours X $85/hour =	$4743.00
Compton	74.0 hours X $60/hour =	4440.00
Minney	9.7 hours X $50/hour =	485.00
	Total attorney fees =	$9668.00

In sum, the Court concludes that the total reasonable cost of attorneys' fees is $9668.00

Counsel has also provided a list of costs and expenses incurred in this case. Upon review, the Court finds that list of costs and expenses to be reasonable and awards those costs in the amount of $1,179.90.

Accordingly, the Court grants defendants' application for reasonable costs and attorneys fees in the amount of $10,847.90.

IT IS SO ORDERED.

David D. Dowd, Jr.
U.S. District Judge

§1988. Preceedings in vindication of civil rights

The jurisdiction in civil and criminal matters conferred on the district courts by the provisions of this Title, and of Title "CIVIL RIGHTS," and of Title "CRIMES," for the protection of all persons in the United States in their civil rights, and for their vindication, shall be exercised and enforced in conformity with the laws of the United States, so far as such laws are suitable to carry the same into effect; but in all cases where they are not adapted to the object, or are deficient in the provisions necessary to furnish suitable remedies and punish offenses against law, the common law, as modified and changed by the constitution and statutes of the State wherein the court having jurisdiction of such civil or criminal cause is held, so far as the same is not inconsistent with the Constitution and laws of the United States, shall be extended to and govern the said courts in the trial and disposition of the cause, and, if it is of a criminal nature, in the infliction of punishment on the party found guilty. [In any action or proceeding to enforce a provision of sections 1977, 1978, 1979, 1980, and 1981 of the Revised Statutes [42 USCS §§ 1981-1983, 1985, 1986], title IX of Public Law 92-318 [20 USCS §§ 1681 et seq.], or in any civil action or proceeding, by or on behalf of the United States of America, to enforce, or charging a violation of, a provision of the United States Internal Revenue Code [26 USCS §§ 1 et seq.], or title VI of the Civil Rights Act of 1964 [42 USCS §§ 2000d et seq.], the court, in its discretion, may allow the prevailing party, other than the United States, a reasonable attorney's fee as part of the costs.

(R.S. § 722, Oct. 19, 1976, P.L. 94-559, § 2, 90 Stat. 2641.)

Office - Supreme Court, U.S.
FILED
FEB 14 1985
ALEXANDER L. STEVAS,
CLERK

No. 84-858

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID TARTER, et al.
Respondents
v.
WILLIAM RAYBUCK, et al.
Petitioners

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR RESPONDENT

CARMEN V. ROBERTO
VASKO, HOWARD & MORRIS CO., L.P.A.
1706 Ohio Edison Building
76 South Main Street
Akron, Ohio 44308
Telephone (216) 376-3607
Counsel for Respondents

BEST AVAILABLE COPY

TABLE OF CONTENTS

Table of Authorities ..... *ii*
Statement of the Case 1
Summary of Argument 6
Argument 7
Conclusion 12
Certificate of Service 13

TABLE OF AUTHORITIES

Cases **Page(s)**

Christiansburg Garment Co. v. EEOC, 434 U.S. 412 (1978) 6,8,9,11

Hughes v. Rowe, 449 U.S. 5 (1980) 8,11

Tarter v. Raybuck, _____ f.2d _____ (6th Cir. 1984) .....

Statutes

42 U.S.C. §1983 1,7

STATEMENT OF THE CASE

This action was brought under 42 U.S.C. §1983. The Plaintiffs (Respondents herein) were David Tarter and his mother and father, Judy and Dennis Tarter. The Defendants were five (5) school administrators and the Board of Education of Cuyahoga Falls, Ohio.

The claim under the Civil Rights Statute was that David Tarter had been subjected to an unlawful search by the Defendant administrators. Joined with this claim was one for the false imprisonment of David and his parents. The Complaint also asked for an order compelling the Defendants school board and school administrators to allow David to reenter Cuyahoga Falls High School.

The case was tried to the United States District Court for the Northern District of Ohio, Eastern Division, Judge Dowd presiding. Respondent, David Tarter, was a student in his junior year of high school at Cuyahoga Falls. On the morning of March 3, 1981, David came to school early, before 7:30, and joined other students waiting for morning classes to start at 8:00. They were standing in an area of the school parking lot designated as a smoking area for the students.

Unknown to them the students were being watched by school administrators, including three (3) of the Petitioners (Rump, Raybuck and Spargur). They were stationed at different windows inside the building, so that they could see the students but the students could not see them. Two (2) of the three (3) were stationed in positions about forty (40) feet distant from the center of the smoking area, where the students were gathered.

From their respective positions, not one of the Defendants could get an unobstructed view of all that was going on outside. They had to relay to each other what each one could observe from his particular vantage point. There were about fifty (50) students milling around in the smoking area; and it was not yet completely light out, the surveillance going on from about 7:05 to 7:25 on an early March morning.

The Petitioners testified that while they watched, a number of students were passing around a marijuana cigarette and smoking it. They said Respondent, David Tarter,

was one of these students. David Tarter testified he was smoking a regular cigarette. The Petitioners also testified that they thought David either bought or sold — they couldn't tell which — a bag of marijuana while they were watching. David Tarter denied this.

At a signal the school officials emerged from their hiding places and descended on the students in the smoking area, rounding up about twenty (20) of them. These twenty (20) were told to follow them into the teachers' lounge.

Once inside, several of the students were told they were suspended from school. David Tarter was one of these. The Cuyahoga Falls police were called. With the police on their way to the school, David and some of the other students were asked to empty their pockets. They did. David Tarter had a pack of cigarettes.

When the police arrived two (2) students were more intensively searched and these two (2) were then taken in the cruiser to the police station. David Tarter was taken by Petitioners Raybuck and Spargur to the school clinic, a one-door room smaller than a jury-box. Petitioner, Raybuck, said he wanted to conduct another search. David Tarter was asked to remove his coat, shirt, boots and socks, and to again empty his pockets. He did, but only because, as he testified, he "was scared." Then he was told to remove his trousers. At this point Respondent, David Tarter, refused. The Cuyahoga Falls police were then called a second time and the school also called David Tarter's mother.

Some twenty (20) minutes later Mr. and Mrs. Tarter arrived at Cuyahoga Falls High School. They were taken to the clinic room where their son David was being held. When they walked in they found him sitting mostly undressed on a cot with the contents of his pockets spread out on the cot. Now in the room, in addition to Petitioners Raybuck and Spargur, were two (2) other school officials, one of them Petitioner Rump.

Respondent Dennis Tarter asked what was going on. When Petitioner Rump told him he told his son to get dressed. He said only the police had the right to search his son. Petitioner Raybuck told David not to get dressed.

Dennis Tarter said they were going to leave. He said the

police station was only one street away; that the police had had plenty of time to get there if they were coming, and if they wanted to search his son the school had his address and the police could find him at home.

Petitioner Rump stood leaning up against the door. He said they weren't going anywhere. A heated argument ensued, and Mrs. Judy Tarter became very upset and nervous and began crying. Finally, Mr. Dennis Tarter, after first getting Petitioner Rump out of the way so that they could get out the door, took his family home.

As a result of this incident, Mrs. Judy Tarter became very upset and had to have medical treatment for her nerves.

David Tarter was expelled from school for the balance of the school year. Mrs. Judy Tarter, however, had not been informed that the expulsion was only for that year. The first time she learned that he could have returned the next year was at this trial. It was on the basis of this evidence that developed at trial that the Court granted the Motion for directed verdict for the Defendants on Plaintiff's claim asking for an Order allowing reinstatement in school.

No warrant had been obtained for the search that was conducted on David Tarter.

At the close of the Tarters' case, the Defendants moved the Court for a directed verdict on all claims. The Motion was for the most part denied, but that part of the action asking for an Order to reinstate David as a student was dismissed.

The trial was completed and Briefs were submitted to the Court by both parties. The Court issued an opinion holding for the Defendants. In addition, the Court decided that the Plaintiffs' claims had no foundation and awarded attorney fees to the Defendants on their Counterclaim therefor.

Respondents appealed to the United States Court of Appeals for the Sixth Circuit in Cincinnati, Ohio. The Apellate Court affirmed the District Court's decision in favor of Petitioners but reversed the Judgment granted Petitioners on their Counterclaim. Petitioners seek a Writ of Certiorari from this honorable Court for review of that portion of the United States Court of Appeals for the Sixth Circuit's decision reversing the award of reasonable attorney fees to Petitioners.

SUMMARY OF ARGUMENT

The United States Court of Appeals for the Sixth Circuit correctly applied *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (p. 978) when it held that Petitioners were not entitled to an award of attorney fees.

ARGUMENT

Respondents take exception to Petitioners' claim that this matter presents critical questions of federal law concerning the award of attorney fees to prevailing parties in Civil Rights litigation (42 U.S.C. §1983). It is the contention of Respondents that the constitutional issue concerning the lawfulness of the search of Respondent, David Tarter, has been the critical issue throughout this matter. While unhappy with the determinations made by the lower courts on this issue Respondents have accepted same and do not challenge such herein. We merely suggest that the outcome on that issue was not as easily perceptible at the initiation of Respondents' suit as current hindsight might indicate it should have been. Respondents are in absolute disagreement with Petitioners that their suit was frivolous and unreasonable, especially since same concerned the ever-changing and continually evolving doctrines of the law of search and seizure.

Prior to analyzing the applicable law a word must be directed to Petitioners' voiced concerns for financially troubled Boards of Education. While financial trouble more frequently results from bad management then the attempted vindication of violated civil rights to say that the Petitioners are entitled to recover their legal fees in this particular suit due their financial problems is a step we would urge this Court to hesitate to take. To punish these particular Petitioners (more financially troubled than Respondents) by compelling payment of Petitioners legal fees and Court expenses for the policy purpose so nobly suggested by Petitioners would, in our estimation, make an example of litigants undeserving of such who proceeded without malice herein and who have been taxed with costs at all levels of these proceedings. However noble the purpose of preventing

frivolous suits might be this is certainly not the case in which to adopt the doctrine urged upon the Court by the Petitioners. The analytical disagreement between the two lower courts on the search issue alone indicates the debatability of Respondents' contentions and in light of such their suit can hardly be classified as frivolous and unreasonable.

The Court of Appeals correctly analyzed *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978), *Hughes v. Rowe*, 449 U.S. 5 (1980) and a plethora of cases concerning this issue in deciding that the District Court had abused its discretion. As the Court of Appeals points out on pages 19 and 20 of its decision (_____ F.2d at _____, Petitioners App. A., p. A-34 and A-35):

> As previously stated we are not inclined to resolve this case on the finding that David Tarter freely consented to the search. In examining this claim in light of standards enunciated in *Christiansburg*, we hold the district court abused its discretion in awarding attorneys fees to defendants in this case. First, we cannot conclude that this action was wholly meritless or without foundation. See *Christiansburg*, supra. We specifically note that the issue of a student's fourth amendment rights in the context of a search by a school official is not a well settled area of the law in the country or in this circuit. This factor mitigates against an award to defendants. See *Reichenberger*, supra. Indeed, the United States Supreme Court has scheduled for reargument next term a case which may address directly a factual situation not unlike the case at bar. The question the Court has directed to be considered in ordering reargument is essentially whether an assistant principal violated a student's fourth amendment rights when he searched her purse based upon information from a teacher that the student had been smoking in the girl's bathroom in contravention of school rules. See *New Jersey v. T.L.O.*, 52 U.S.L.W. 3935 (June 26, 1984) scheduling the case for reargument.[9] Finally, as suggested in

Reichenberger, supra, the district court did make a finding that the suit was frivolous under the *Christiansburg* guidelines. However, we cannot conclude the record adequately supports such a finding. The district court's analysis of the award with respect to the fourth amendment claim was limited only to his determination that because consent was freely given, plaintiff's claim was groundless. 556 F. Supp. at 632. As we have previously discussed, plaintiff's case was not so easily resolved. Although plaintiff's claim ultimately proved unsuccessful, it was not so meritless or without foundation that defendant was properly awarded attorney's fees as the prevailing party in this case in light of the legislative history behind section 1988, the Civil Rights statutes, and the *Christiansburg* standards enunciated by the Supreme Court.

Christiansburg warns that judges not engage in *post hoc* reasoning to justify such an award. 434 U.S. at 422. "Even when the law or the facts appear questionable or unfavorable at the outset, a party may have an entirely reasonable ground for bringing suit." Id. "Decisive facts may not emerge until discovery or trial." Id.

We conclude this lawsuit is the type of case contemplated by the Supreme Court in enunciating the words of caution just quoted. The issue of consent was reasonably in dispute given the context of the purported waiver of important constitutional rights. The exact nature and extent of a student's fourth amendment rights are not well settled. Furthermore, there is no definitive standard established on when school officials may undertake incursions on traditional fourth amendment protections, in order to maintain school order and discipline. Also, the presence of the police at the high school surrounding the time of the incident in question raised a legitimate question of whether the standard of conduct of the school officials was

> the same as for police officials. That the district court or this court ultimately declined to adopt the positions urged by plaintiffs on these questions is not tantamount to concluding defendants are entitled to an attorneys fees award under section 1988.
>
> We hold therefore, that the district court abused its discretion in awarding defendants judgment on their counterclaim for attorney's fees pursuant to 42 U.S.C. § 1988.

Respondents are in total agreement with the Court of Appeals analysis.

Other matters should be considered by this honorable Court before accepting jurisdiction of this case. Although the District Court ultimately ruled the Respondents' suit to be frivolous, the same Court, in part, overruled Petitioners' Motion for a Directed Verdict. At that time it can be argued that the District Court clearly did not consider this to be a frivolous and unreasonable suit. Neither did Respondents seek a Motion for Summary Judgment. Had they done so their expenses (were their claim of frivolity capable of substantiation) would have been minimized. Should they now be allowed to profit at Respondents' expense for allowing a frivolous case to proceed to trial?

In the case of *Hughes v. Rowe*, 449 U.S. 5 (1980) this Court refused to impose an award of attorney fees against the Plaintiff even though there had been a judgment on the pleadings against Plaintiff and though attorney fees had been granted by the lower court, citing *Christiansburg Garment Co. v. EEOC*, 434 U.S. 412 (1978).

Respondents urge this honorable Court to refrain from taking the step Petitioners would have this Court take. Jurisdiction should be denied herein.

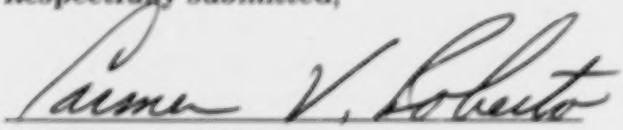
---

[9]As noted, *supra* at Note 3, the issue was not initially before the Court. Rather the issue initially presented was only whether the exclusionary rule applied where the state sought to introduce that evidence in a subsequent criminal proceeding.

CONCLUSION

Respondents urge this Court to deny Petitioners' Writ of Certiorari.

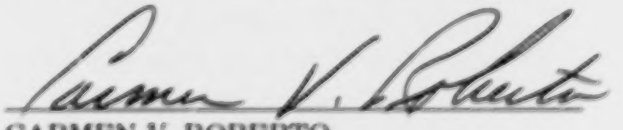
Respectfully submitted,



CARMEN V. ROBERTO
VASKO, HOWARD & MORRIS CO., L.P.A.
1706 Ohio Edison Building
76 South Main Street
Akron, OH 44308
Telephone (216) 376-3607
Counsel for Respondents

CERTIFICATE OF SERVICE

I hereby certify that a copy of Respondents' Brief in Opposition to Petitioners' Writ of Certiorari was sent by regular U.S. Mail on February 13, 1985 to Dennis M. Whalen, Counsel of Record for Petitioners, and G. Frederick Compton, Jr., counsel for Petitioners at the Dennis M. Whalen Co., L.P.A., 135 Portage Trail, P.O. Box 8, Cuyahoga Falls, Ohio 44222.



CARMEN V. ROBERTO
Counsel for Respondents

Office - Supreme Court, U.S.
FILED
FEB 28 1985
ALEXANDER L. STEVAS
CLERK

No. 84-858

In the Supreme Court of the United States

OCTOBER TERM, 1984

DAVID TARTER, et al.,

Respondents

v.

WILLIAM RAYBUCK, et al.,

Petitioners

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT REPLY BRIEF OF PETITIONERS

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone (216) 929-4291
Counsel of Record for Petitioners

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone (216) 929-4291
Counsel for Petitioners

TABLE OF CONTENTS

	Page
Table of Authorities	ii
Argument	1
Conclusion	5
Certificate of Service	6

TABLE OF AUTHORITIES

Cases	Page
New Jersey v. T.L.O., ____ U.S. ____ (1985)	1
Tarter v. Raybuck, 556 F. Supp. 625 (N.D. Ohio 1983)	1,2,3
Tarter v. Raybuck, 742 F. 2d 977 (6th Cir. 1984)	1

Statutes	
42 U.S.C. §1988	2,4
Ohio Revised Code §3313.66	2

ARGUMENT

The Respondents, in their opposing Brief, have clearly misstated some of the factual matters which were adduced by the District Court from the testimony and other evidence presented at the trial. The Respondents indicate in their Brief at page two (2) that David Tarter removed his coat, shirt, boots, and socks, at the request of Petitioners Raybuck and Spargur, because he "was scared." However, the District Court, who was in the best position to observe the demeanor of the witnesses, weigh the evidence, and carefully consider the pleadings, specifically concluded that "the plaintiff David Tarter freely and voluntarily consented to a search of his person to the extent that a search was conducted." 556 F. Supp. at 629 (App. B, p. B-42). In addition, the District Court went on to state that even assuming *arguendo* that David Tarter was intimidated by the presence of his high school principal to consent involuntarily, the search would not necessarily be unconstitutional. 556 F. Supp. at 629 (App. B, pp. B-42-43). The District Court then applied a standard of reasonableness identical to the standard recently stated by this Court in *New Jersey v. T.L.O.*, ____ U.S. ____ (1985), and concluded that Petitioners Raybuck and Spargur "acted reasonably in connection with the search of David Tarter on March 3, 1981." 556 F. Supp. at 630 (App. B, p. B-44). Thus, contrary to the assertion of the Respondents and the Court of Appeals, "the District Court's analysis of the award with respect to the fourth amendment claim was [not] limited only to his determination that because consent was freely given, plaintiff's claim was groundless." 742 F. 2d at 988 (App. A, p. A-34). Rather, the District Court not only analyzed the question of consent, but also considered "the reasonableness, under all the circumstances, of the search" as this Court subsequently mandated in its recent decision in *T.L.O.*, ____ U.S. at ____, and, based upon its analysis, the District Court concluded that the Respondents' action was "frivolous, unreasonable, or without foundation'" 556 F. Supp. at 631 (App. B, p. B-46), and it granted the Petitioners judgment on their counterclaim for reasonable attorney fees

pursuant to the provisions of 42 U.S.C. §1988. 556 F. Supp. at 632 (App. B, p. B-47).

On page three (3) of their Brief, the Respondents assert that Respondent Judy Tarter had not been informed that the expulsion of David Tarter from school was only for that year. This statement is simply not true. The District Court expressly concluded that

> [t]he complaint was filed in September of 1981 after David Tarter, as a matter of law, was eligible to return to school because his expulsion was for only the semester, consistent with the provision of Ohio Revised Code §3313.66. *The fact that the expulsion was for only the period of a semester was clearly indicated by a letter mailed to the plaintiffs following the expulsion.* See Exhibit 5.
>
> 556 F. Supp. at 631
> (App. B, p. B-47)
> (Emphasis Added)

In addition, the record clearly reflects that, upon cross examination, Judy Tarter acknowledged receiving this letter (Tr. pp. 48-49). One of the prayers for relief requested in the Respondents' Complaint was that the Court order the Petitioners to permit David Tarter to reenter Cuyahoga Falls High School. Yet, the record establishes and the District Court found that at the time the Complaint was filed David Tarter was already, as a matter of law, entitled to return to school.

The Respondents on page three (3) of their Brief also indicate that the motion of the Petitioners for a directed verdict made at the conclusion of the Respondents' case "was for the most part denied." Therein lies the crux of this matter. Both the Respondents in their Brief and the Court of Appeals in its decision gloss over or ignore altogether the significant fact that the District Court concluded that there was no evidence whatsoever stating a claim against three (3) of the Petitioners, Wilson, Rovnyak, and the Board of Education; and, accordingly, the District Court sustained the motion for a directed verdict made on their behalf. 556 F.

Supp. at 626 (App. B, p. B-37). Thus, even assuming *arguendo* that the other Petitioners were not entitled to an award of attorney fees, the Petitioners respectfully submit to this Court that there is absolutely no justification whatsoever for denying an award of attorney fees to Petitioners Wilson, Rovnyak, and the Board of Education, who were dismissed from the case at the conclusion of the Respondents' presentation of evidence.

The Petitioners Wilson, Rovnyak and the Board of Education were named in the Complaint in the "non-search" causes of action. Petitioners Wilson and Board of Education were allegedly involved in the improper expulsion of David Tarter and refusal to permit David Tarter to return to school. Despite the allegations of the Complaint, the Trial Court found that

> At trial, no attempt was made to attack the expulsion procedures. Rather, the plaintiffs prosecuted claims of an unconstitutional search of the student plaintiff, David Tarter, and the false imprisonment of all three plaintiffs.
>
> 556 F. Supp. at 629
> (App. B., p. B-42)

As stated in the Petitioners' original Petition, the District Court and the Court of Appeals found from the record that the alleged false imprisonment was "patently without merit." 556 F. Supp. at 632; 742 F. 2d at 987. Petitioners Rovnyak and Rump were named only in relation to the alleged false imprisonment. Such failure to present evidence in support of their original allegations is tantamount to a frivolous use of the courts of this land and, as such, this Court should render a decision which clearly establishes the duty of a plaintiff not to misuse the availability of the judicial forum.

Finally, the Respondents assert on page seven (7) of their Brief that

> [a]lthough the District Court ultimately ruled the Respondents' suit to be frivolous, the same Court,

> in part, overruled Petitioners' Motion for a Directed Verdict. At that time it can be argued that the District Court clearly did not consider this to be a frivolous and unreasonable suit. Neither did Respondents [sic] seek a Motion for Summary Judgment. Had they done so their expenses (were their claim of frivolity capable of substantiation) would have been minimized. Should they now be allowed to profit at Respondents' expense for allowing a frivolous case to proceed to trial?

It becomes obvious that the Respondents are "grasping for straws" by attempting to shift the responsibility for this frivolous action from themselves, where it rightfully belongs, to the District Court and/or the Petitioners. However, it was not the District Court nor the Petitioners who initiated this action and continued to pursue it through extensive discovery and, finally, a trial.

In addition, with respect to the first part of the Respondents' argument, it is significant to reiterate that the Trial Court did grant a directed verdict to Petitioners Rovnyak, Wilson, and the Board of Education. Thus, taking this argument to its logical conclusion, the Respondents appear to be conceding that these three (3) Petitioners are entitled to an award of reasonable attorney fees.

With respect to the second part of the Respondents' argument, it is sufficient to state that the Petitioners viewed this lawsuit as frivolous from its inception as evidenced by the Counterclaim for reasonable attorney fees and costs incurred in their defense which was filed on October 21, 1981.

Therefore, the Petitioners as the prevailing parties in this action are entitled to an award of reasonable attorney fees and costs pursuant to the provisions of 42 U.S.C. §1988, and the decision of the Court of Appeals reversing the order of the District Court granting the same must itself be overturned by this honorable Court.

CONCLUSION

The Petitioners, individually and collectively, strongly urge this Court to grant the Petition for a Writ of Certiorari previously filed herein.

Respectfully submitted,

DENNIS M. WHALEN
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel of Record for Petitioners

G. FREDERICK COMPTON, JR.
DENNIS M. WHALEN CO., L.P.A.
135 Portage Trail, P.O. Box 8
Cuyahoga Falls, Ohio 44222
Telephone: (216) 929-4291

Counsel for Petitioners

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Reply Brief of Petitioners was served upon Carmen V. Roberto, Counsel for Respondents, 1706 Ohio Edison Building, 76 South Main Street, Akron, Ohio 44308 by placing same in the regular U.S. mail service, postage prepaid, this ____ day of February, 1985.

_____

DENNIS M. WHALEN
Counsel for Petitioners